

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MATTHEW ARTHUR FIELDS,

Petitioner,

vs.

ROBERT LEGRAND, et al.,

Respondents.

Case No. 3:11-cv-00341-RCJ-WGC

ORDER

Before the court are the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (#6), respondents' second motion to dismiss (#29), petitioner's opposition (#37), and respondents' reply (#39). The court finds that some grounds for relief are procedurally defaulted, and the court grants respondents' motion.

Earlier, the court had found that petitioner had not exhausted his available state-court remedies for the following claims:

1. Claims in grounds 2 and 4 that counsel was ineffective because he failed to cross-examine witness Rowe at sentencing;
2. Claim in ground 2 that counsel was ineffective because he failed to obtain records from his 2000 misdemeanor conviction;
3. Claim in ground 4 that counsel was ineffective because he failed to present mitigating evidence at sentencing, including family members' testimony;
4. Claim in ground 4 that counsel was ineffective because he failed to correct the pre-sentence report;
5. Ground 6.

1 Order (#19), at 7-8. Petitioner moved to stay the action while he returned to state court, and the
2 court granted the motion. Order (#23). Petitioner filed his second state habeas corpus petition in
3 the state district court on April 11, 2012. Ex. 51 (#31). The state district court dismissed the
4 petition because it was successive. Ex. 53 (#31). Petitioner appealed. The Nevada Supreme Court
5 affirmed, holding that the petition was untimely pursuant to Nev. Rev. Stat. § 34.726(1) and
6 successive pursuant to Nev. Rev. Stat. § 34.810. Ex. 70 (#32). Upon petitioner's request, the court
7 reopened this action. Amended Order (#28). Respondents second motion to dismiss (#29)
8 followed.

9 A federal court will not review a claim for habeas corpus relief if the decision of the state
10 court regarding that claim rested on a state-law ground that is independent of the federal question
11 and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 730-31 (1991).

12 In all cases in which a state prisoner has defaulted his federal claims in state court
13 pursuant to an independent and adequate state procedural rule, federal habeas review
14 of the claims is barred unless the prisoner can demonstrate cause for the default and
actual prejudice as a result of the alleged violation of federal law, or demonstrate that
failure to consider the claims will result in a fundamental miscarriage of justice.

15 Id. at 750; see also Murray v. Carrier, 477 U.S. 478, 485 (1986). The grounds for dismissal upon
16 which the Nevada Supreme Court relied in this case are adequate and independent state rules. Vang
17 v. Nevada, 329 F.3d 1069, 1074 (9th Cir. 2003) (Nev. Rev. Stat. § 34.810); Loveland v. Hatcher,
18 231 F.3d 640 (9th Cir. 2000) (Nev. Rev. Stat. § 34.726); Moran v. McDaniel, 80 F.3d 1261 (9th Cir.
19 1996) (same).

20 Petitioner argues unpersuasively that his return to state court was futile and that the court
21 should consider the procedurally defaulted claims on their merits. The court disagrees. Although
22 petitioner faced the time bar and the successive-petition bar when he returned to state court, both
23 § 34.726 and § 34.810 allow those bars to be excused upon a showing of cause and prejudice. It is
24 difficult to make that showing, but failure is not automatic, and this court does not speculate how
25 state courts would rule on the question. More importantly, as respondents note correctly, the cause-
26 and-prejudice standard in state court is identical to the cause-and-prejudice standard that this court
27 uses to excuse procedural default. If petitioner were to concede that he could not show cause and
28 prejudice in state court, then he necessarily would concede that the grounds are procedurally

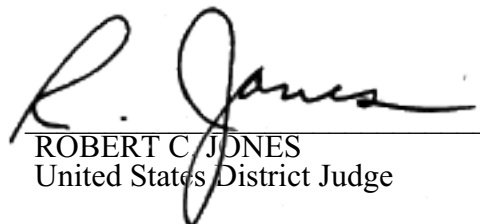
1 defaulted in federal court and that he could not show cause and prejudice to excuse those defaults.
 2 In effect, petitioner would need to dismiss the unexhausted claims from his petition, or the court
 3 would dismiss the entire petition because it contained both exhausted and unexhausted claims.
 4 Instead, petitioner asked to return to state court. The attempt did not succeed, but the court cannot
 5 hold that the attempt was futile. In the end, petitioner is no worse off than if he had dismissed the
 6 unexhausted grounds.

7 IT IS THEREFORE ORDERED that respondents' second motion to dismiss (#29) is
 8 **GRANTED**. The following claims are **DISMISSED** with prejudice because they are procedurally
 9 defaulted:

- 10 1. Claims in grounds 2 and 4 that counsel was ineffective because he failed to
 11 cross-examine witness Rowe at sentencing;
- 12 2. Claim in ground 2 that counsel was ineffective because he failed to obtain records
 13 from his 2000 misdemeanor conviction;
- 14 3. Claim in ground 4 that counsel was ineffective because he failed to present
 15 mitigating evidence at sentencing, including family members' testimony;
- 16 4. Claim in ground 4 that counsel was ineffective because he failed to correct the pre-
 sentence report;
- 17 5. Ground 6.

18 IT IS FURTHER ORDERED that respondents shall have forty-five (45) days from the date
 19 of entry of this order to file and serve an answer to the remaining claims, which shall comply with
 20 Rule 5 of the Rules Governing Section 2254 Cases in the United States District Courts. Petitioner
 shall have forty-five (45) days from the date on which the answer is served to file a reply.

21 Dated: March 24, 2015.

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 24 ROBERT C. JONES
 United States District Judge
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